

**BEFORE THE MADURAI BENCH OF MADRAS HIGH
COURT**

DATED: 19/11/2010

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THE HONOURABLE MR.JUSTICE K.CHANDRU

W.P.(MD)NO.82 of 2010

and

M.P.(MD)No.2 of 2010

K.Shanmugam .. Petitioner

vs

1.The Registrar,

State Chief Information Commissioner,

Tamilnadu Information Commission,

Chennai-18.

2.The Principal Commissioner/

The Special Commissioner,

Department of Commercial Taxes,

Chepauk,

Chennai-5.

3.The Joint Commissioner,

Commercial Taxes,

Commercial Tax Buildings,

Dr. Thangaraj Salai,

Madurai-20.

4.A.Fathimabee .. Respondents

This writ petition has been preferred under Article 226 of the Constitution of India praying for the issue of a writ of certiorari to call for the records on the file of the first respondent in case No.12050/Enquiry/09, dated 07.12.2009 and to quash the same as arbitrary, illegal and excess of jurisdiction.

!For Petitioner ... Mr.A.Thiyagarajan, SC

for Mr.S.Karunakar

^For Respondents ... Mr.Pala Ramasamy for R-1

Mr.S.C.Herold Singh, GA for RR2 and 3

:ORDER

This writ petition is filed by the petitioner challenging an order, dated 7.12.2009 passed by the Tamil Nadu Information Commission, wherein and by which the petitioner who is the Commercial Tax Officer, Roving Squad (Additional), Madurai was directed to pay Rs.1000/- as compensation to the fourth respondent for being dragged her unnecessarily to attend an enquiry and also personal explanation should be called for as to why penalty prescribed under the Act should not be imposed. Further, a direction was issued to frame a charge under Rule 17(b) of the Tamil Nadu Government Servants (Disciplinary & Appeal) Rules for refusing to accept a RTI petition. It was found that there was failure to discharge duty.

2. Apart from the averments mentioned in the affidavit, in paragraph No.12(b) it was stated that he was not put on any notice and no opportunity was given to put forth his case. The order is opposed to principles of natural justice.

3. The writ petition was admitted on 06.01.2010. Pending the writ petition, an interim stay was granted initially for a limited period. Subsequently, it was extended from time to time. On notice from this court, the third respondent has filed a counter affidavit, dated 04.10.2010. In the counter affidavit, the department contended that the action of the petitioner was against the spirit of the enactment. Pursuant to the direction of the Commission, the charge memo under Rule 17(b) was framed. But the petitioner is yet to submit his explanation and he is reaching the age of superannuation.

4. In any event, the issue raised herein is no longer res integra. This Court in The Public Information Officer/General Manager-in-charge, Villupuram District Central Cooperative Bank Ltd. Vs. The Tamil Nadu Information Commission, Chennai and others in W.P.No.21441 of 2009, dated 06.01.2010 dealt with the similar issue. In paragraphs 17 to 23 this court held as follows: "17. In any event, a direction to recover the amount as penalty itself indicates that it is penal in nature and a further direction to take disciplinary action will result in their service career being jeopardised. Further, a day's delay involves penalty of Rs.250/- and a maximum penalty is fixed at Rs.25000/-. Therefore, the Commission has discretion to order penalties ranging from Rs.250/- to Rs.25000/-. But, in all the five cases, only maximum penalties were imposed on the petitioners. In some of the cases, direction to place them under suspension and to frame charges under the relevant service rules have also been recommended. In each of the case, the petitioners have some plausible

defence to put forth. But no separate enquiries were conducted by the Commission.

18. Though Section 20 enjoins the Information Commission at the time of deciding any complaint or appeal and also to decide the question of penalty, a careful reading of the relevant provisions including first proviso to Section 20 will show that it obliges a reasonable opportunity of being heard on the question of penalty and in recommending initiation of disciplinary proceedings. It also requires the Commission to form an opinion about the conduct of an Information Officer. Therefore, it involves a separate action by the Commission against the officer concerned so that they can put forth their defence either about their bona fides or plead for minimum penalty.

19. When minimum and maximum penalties have been prescribed, the proportionality of such penalties can also be granted, which can be pleaded by any officer. Therefore, it obliges the Commission to pass a separate order after issuing separate show cause notice to the information officer so as to enable them to satisfy the Commission with their defence.

20. In one case, the writ petitioner was not the notified officer at the relevant time. But it is necessary that penalty should be imposed on a named officer, who was acting as the Information Officer at the relevant time. The imposition of penalty and recommendation for disciplinary action can be taken on several grounds including the grounds of delay, malafide denial, incorrect or incomplete or misleading information, etc. Therefore, in each of the cases, penalty has to be in proportion to the charge levelled against an information officer. Unless the officer concerned is personally notified with the proposal of the Commission to impose a maximum penalty together with a direction to recommend disciplinary action, imposition of penalty may not be legally valid. The impugned orders are thus liable to be set aside both on the grounds of procedural violation and also on the question of proportionality of the penalty.

21. The Supreme Court in [Om Kumar v. Union of India](#) reported in (2001) 2 SCC 386 dealt with the scope of judicial review over administrative action affecting fundamental freedoms. The following passages found in paragraphs 54, 59 and 68 may be usefully extracted below:

"54. Administrative action in India affecting fundamental freedoms has always been tested on the anvil of "proportionality" in the last fifty years even though it has not been expressly stated that the principle that is applied is the

"proportionality" principle. For example, a condition in a licence issued to a cinema house to exhibit, at every show, a certain minimum length of "approved films" was questioned. The restriction was held reasonable (see [R.M. Seshadri v. Distt. Magistrate Tanjore](#)²⁷). [Union of India](#) v. Motion Picture Assn.²⁸ also related, inter alia, to the validity of licensing conditions. In another case, an order refusing permission to exhibit a film relating to the alleged obnoxious or unjust aspects of reservation policy was held violative of freedom of expression under Article 19(1)(a) (S. Rangarajan v. P. Jagjivan Ram²⁹). Cases of surveillance by police came up for consideration in *Malak Singh v. State of P&H*³⁰. Cases of orders relating to movement of goods came up in [Bishambhar Dayal Chandra Mohan v. State of U.P.](#)³¹ There are hundreds of such cases dealt with by our courts. In all these matters, the proportionality of administrative action affecting the freedoms under Article 19(1) or Article 21 has been tested by the courts as a primary reviewing authority and not on the basis of *Wednesbury* principles. It may be that the courts did not call this proportionality but it really was.

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59. But, in *E.P. Royappa v. State of T. N.*³² Bhagwati, J laid down another test for purposes of Article 14. It was stated that if the administrative action was "arbitrary", it could be struck down under Article 14. This principle is now uniformly followed in all courts more rigorously than the one based on classification. Arbitrary action by the administrator is described as one that is irrational and not based on sound reason. It is also described as one that is unreasonable.

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68. Thus, when administrative action is attacked as discriminatory under Article 14, the principle of primary review is for the courts by applying proportionality. However, where administrative action is questioned as "arbitrary" under Article 14, the principle of secondary review based on *Wednesbury* principles applies.

22. Though in a given case, this Court can go into the proportionality of a punishment, under normal circumstance, if the court is of the opinion that if a punishment requires reconsideration, it should be remanded to the very same authority for reconsideration. This was made clear in *Om Kumar's* case (cited

supra). The following passages found in paragraphs 70 and 71 may be usefully quoted below:

"70. In this context, we shall only refer to these cases. [In Ranjit Thakur v. Union of India](#)⁴³ this Court referred to "proportionality" in the quantum of punishment but the Court observed that the punishment was "shockingly" disproportionate to the misconduct proved. [In B.C. Chaturvedi v. Union of India](#)⁴⁴ this Court stated that the court will not interfere unless the punishment awarded was one which shocked the conscience of the court. Even then, the court would remit the matter back to the authority and would not normally substitute one punishment for the other. However, in rare situations, the court could award an alternative penalty. It was also so stated in Ganayutham².

71. Thus, from the above principles and decided cases, it must be held that where an administrative decision relating to punishment in disciplinary cases is questioned as "arbitrary" under Article 14, the court is confined to Wednesbury principles as a secondary reviewing authority. The court will not apply proportionality as a primary reviewing court because no issue of fundamental freedoms nor of discrimination under Article 14 applies in such a context. The court while reviewing punishment and if it is satisfied that Wednesbury principles are violated, it has normally to remit the matter to the administrator for a fresh decision as to the quantum of punishment. Only in rare cases where there has been long delay in the time taken by the disciplinary proceedings and in the time taken in the courts, and such extreme or rare cases can the court substitute its own view as to the quantum of punishment." (Emphasis added)

23. In the light of the above, the impugned orders in all the writ petitions will stand set aside. The Commission is hereby directed to give appropriate show cause notices to the petitioners. After hearing them on the question of penalty as well as on its recommendation to take disciplinary action against them, can pass an appropriate order. All the writ petitions will stand partly allowed and to the extent indicated above...."

5. In the light of the above, the impugned order will stand set aside. The writ petition will stand allowed. However, there will be no order as to costs. Consequently, connected miscellaneous petition stands closed. vvk

To

1.The Registrar,
State Chief Information Commissioner,
Tamilnadu Information Commission,
Chennai-18.

2.The Principal Commissioner/
The Special Commissioner,
Department of Commercial Taxes,
Chepauk,
Chennai-5.

3.The Joint Commissioner,
Commercial Taxes,
Commercial Tax Buildings,
Dr. Thangaraj Salai,
Madurai-20.